RHB BANK BHD

v.

FGG WOOD MOULDINGS INDUSTRIES SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D5-22-1233-97]
9 NOVEMBER 2000

CIVIL PROCEDURE: *Judgments and orders - Setting aside, application for - Judge in chambers allowed plaintiff's appeal from registrar's decision in defendant's absence - Whether order made an ex parte order - Whether defendant had a right to set it aside under O. 32 r. 6 Rules of the High Court 1980 - Whether there were merits in the application*

The plaintiff obtained a judgment in default of appearance ('the said judgment') against the 4th defendant pursuant to its claim against him as guarantor of the 1st defendant company under a facilities agreement. The 4th defendant applied to set aside the said judgment and the registrar allowed the application. The plaintiff appealed against the registrar's decision to the judge in chambers. When the hearing came up before the said judge, the 4th defendant's counsel was not present. Nevertheless, the judge allowed the appeal and restored the said judgment. The 4th defendant now applied to set aside the said order of the judge in chambers.

The plaintiff claimed that the 4th defendant had no right to apply to set aside the order of the judge and that his only recourse was to appeal to the Court of Appeal. Whilst the 4th defendant argued that the inadvertence of his counsel should be a sufficient reason to set aside the order of the judge and that he was not aware that the plaintiff had commenced legal proceedings and obtained judgment against him as he was no longer staying in his former address. He only became aware of it when he was served a bankruptcy notice rightly at his present address. Also, that he was persuaded to sign the letter of guarantee in the English Language which he did not understand.

Held:

[1] An *inter partes* application heard in the absence of a party is an *ex parte* hearing and an order made therefrom is an *ex parte* order. Order 32 r. 6 Rules of the High Court 1980 ('RHC') should be read into O. 56 RHC (the rules governing appeals to a judge in chambers). There is always a right in an interlocutory proceeding for a party to apply under O. 32 r. 6 to set aside an order made *ex parte* in his absence whether or not the

matter before the judge is heard on the merits, and whether or not the matter is an appeal from the decision of the registrar or an application in chambers *per se*.

[2] To succeed in his application, the 4th defendant must show valid grounds for his application. Based on authorities, the inadvertence of his counsel to attend to his interest did not constitute a good reason to set aside the order which was regularly obtained.

[3] The 4th defendant never disputed the regularity of the service on him by way of substituted service. Therefore, the place of residence of the 4th defendant was not an issue. The 4th defendant must be deemed to have constructive notice of the issuance of the summons against him wherever he might have resided. Also, the plaintiff's claim that he was persuaded to sign the letter of guarantee and that he did not understand the English language did not afford him a viable defence. In the absence of fraud or misrepresentation a person who signs a document cannot avoid his obligations by simply pleading *non est factum*. It followed therefore, that there were no merits in the application.

[Application to set aside order dismissed; application for stay of execution of judgment in default of appearance also dismissed.]

Case(s) referred to:

Delcont (M) Sdn Bhd v. Motor Sport International Ltd & Ors [1996] 1 CLJ 450 ***(refd)***

Evans v. Bartlam [1937] AC 473 ***(refd)***

Ismail Savoosah & Ors v. Hajee Ismail [1889] 4 Ky 453

L' Estrange v. F Graucob Ltd [1934] 2 KB 394 ***(refd)***

Loo Chay Meng v. Ong Cheng Ho (Gamuda Sdn Bhd garnishee) [1990] 1 MLJ 445 ***(foll)***

Permata Chartered Merchant Bank Bhd v. Hiew Fook Realty (Holdings) Sdn Bhd & Ors [1992] 1 MLJ 73 ***(foll)***

Re Khong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Khong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131 ***(refd)***

Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(foll)***

Tuan Hj Ahmed Abdul Rahman v. Arab Malaysian Finance Bhd [1996] 1 CLJ 241 ***(foll)***

Wan Salimah Wan Jaffar v. Mahmood Omar; Anim Abdul Aziz (Intervener) [1998] 1 CLJ 480 ***(refd)***

Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor [1996] 2 CLJ 628 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 32 r. 6, O. 56

Other source(s) referred to:
Halsbury's Laws of England, 3rd edn, vol 16, p 35
Malayan High Court Practice, 1998, p 2255
The Supreme Court Practice 1995, vol 1, 32/1-6/25

For the plaintiff - Mohd Hafrizam (Harjinder Kaur); M/s Rashid & Lee
For the defendant - CK Lee; M/s Tang & Lee

Reported by Usha Thiagarajah

JUDGMENT

Kang Hwee Gee J:

(Enclosure 51)

This is an application of the 4th defendant to set aside the order of Steve Shim J (as he then was) allowing the plaintiff's appeal against the order of the registrar in setting aside judgment in default obtained by the plaintiff against the 4th defendant earlier.

The Background

The plaintiff bank had by a facilities agreement granted to the 1st defendant company banking facilities of RM3,000,000. The facilities was secured *inter alia*, by the personal guarantee of the 2nd, 3rd, 4th and 5th defendants.

The 1st defendant defaulted in repayment. The plaintiff sued the 1st defendant as the principal debtor and the 2nd, 3rd, 4th and 5th defendants as guarantors.

The writ of summons were duly served on the 1st, 2nd, 3rd and 5th defendants. They entered appearance and subsequently filed their defence to the plaintiff's claim.

As for the 4th defendant however, he could not be located at his last known address. Ultimately he had to be served with the summons by substituted service, by a notice in the Malay Mail and on the notice board of the court.

Having failed to appear on the effective date, judgment in default of appearance was subsequently entered against him by the plaintiff on 15 June 1998.

On 18 November 1998 the 4th defendant applied to set aside the judgment in default of appearance which had been entered against him before the registrar.

On 4 January 1999 the registrar allowed the 4th defendant's application to set aside judgment in default.

The plaintiff appealed against the registrar's decision.

The hearing came before Steve Shim J on 17 January 2000. The 4th defendant's counsel did not turn up. Nevertheless, Steve Shim J proceeded to hear the plaintiff's appeal in his absence. His Lordship allowed the appeal and restored the judgment in default obtained by plaintiff against 4th defendant.

Hence this application by the 4th defendant (encl. 51) to set aside the said order.

The Issue

At the heart of this application is the issue of whether an appeal from the decision of the registrar to a judge in chambers heard in the absence of one party may be set aside.

Counsel for the plaintiff contends that once the judge in chambers had considered the application on the merit by hearing the plaintiff as in this case, his decision cannot be set aside. She/he relied on *Delcont (M) Sdn. Bhd. v. Motor Sport International Ltd & Ors* [1996] 1 CLJ 450, the factual matrix of which appears to be on all fours with the instant case.

In that case the plaintiff had appealed against the decision of the registrar allowing the defendant to set aside the issue and service of the writ of summons and statement of claim. At the hearing of the appeal to the judge in chambers, neither the defendant nor his counsel was present although the latter had been duly served with the notice of hearing. Nevertheless, the court proceeded to hear the plaintiff's submission and upon reserving judgment, allowed the plaintiff's appeal.

Upon the defendant applying to set aside the decision, Kamalanathan Ratnam JC (as he then was) held that a party who failed to appear in an appeal to a judge in chambers from the decision of the registrar cannot apply to set aside a decision which had been heard on the merit. His only recourse was to appeal against that decision.

That decision appears to have departed from the established principle in *Loo Chay Meng v. Ong Cheng Ho (Gamuda Sdn. Bhd. Garnishee)* [1990] 1 MLJ 445 read with *Permata Chartered Merchant Bank Bhd. v. Hiew Fook Realty (Holdings) Sdn. Bhd. & Ors* [1992] 1 MLJ 73.

In *Loo Chay Meng* VC George J held that an *inter partes* application heard in the absence of a party is an *ex parte* hearing and an order made therefrom is an *ex parte* order made in chambers and therefore the court making the order has the jurisdiction to set it aside under O. 32 r. 6 which provides that:

> The Court may set aside an order made *ex parte.*

In the subsequent case of *Permata Merchant Bank* the same judge held that there was a lacuna in the provisions in O. 56 relating to appeals to a judge in chambers from the decision of the registrar as it failed to make provision for an application to restore an appeal that was struck off without it being heard on account of the appellant having been absent. It held that the court should be free to read into O. 56, the enabling O. 32 r. 6 which provides that the court may set aside an order made *ex parte.* Alternatively, the court may act under its inherent power to do so.

It is true that *Loo Chay Meng* is concerned with providing an avenue for a party failing to appear at the hearing of an appeal before the judge in chambers to apply to set aside an order made against him under the more general provision of O. 32 r. 6 as opposed to providing an avenue for a party failing to appear at the hearing of an appeal from the registrar to the judge in chambers under O. 56. But the distinction is now no longer of relevance for the Supreme Court in *Seloga Jaya Sdn. Bhd. v. Pembinaan Keng Ting (Sabah) Sdn. Bhd*. [1994] 2 CLJ 716 has now held that in an appeal from a discretionary order of the registrar to a judge in chambers, the judge should exercise his own discretion as though the matter was before him for the first time, unfettered by the previous exercise of the registrars' discretion. It ruled that although the matter before the judge was in form an appeal, it took the shape and style of a rehearing.

The principle was restated in the Federal Court decision in *Tuan Haji Ahmed Abdul Rahman v. Arab Malaysian Finance Bhd.* [1996] 1 CLJ 241 where the same judge Edgar Joseph Jr FJ speaking for the panel said at p. 248:

> With respect, in appeals to a judge in chambers from the decision of a registrar of the High Court, the judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the subordinate courts. Such appeals from decisions of the registrar are by way of an actual rehearing and the judge treats the matter as though it comes before him for the first time. The judge is therefore not confined to the points taken before the registrar so that the rule about new points being not generally open to an appellant to take on appeal does not apply. In support, we would refer to the following passage in the judgment of Payne J in *Blundell v. Rimmer* [1971] 1 All ER 1072 at p. 1076: [1971] 1 WLR 123 at p. 127.

The two decisions of the highest courts in the land illustrate clearly that there is indeed no difference between hearing an appeal from the registrar and hearing an application in chambers *per se*. They serve to reinforce and validate the view expressed by VC George J in *Loo Chay Meng* and *Permata Merchant Bank (supra)* that one should read into O. 56, (the rules governing appeals to a judge in chambers), r. 6 of O. 32 allowing the court to hear an application to set aside an order made *ex parte* in the absence of the party making the application.

On my part I would not follow the decision in *Delcont (M) Sdn Bhd (supra)* in so far as it ruled that the only recourse was for the appellant in the situation described was to appeal. For the reason alluded to earlier, I am of the view that there is always a right in an interlocutory proceeding for a party to apply under O. 32 r. 6 to set aside **an order made *ex parte*** in his absence whether or not the matter before the judge was heard on the merit, and whether or not the matter was an appeal from the decision of the registrar or an application in chambers *per se*. The nature of O. 32 r. 6 may be better understood by referring to the commentary in *The Supreme Court Practice* 1995 vol. 1 at 32/1-6/25 which reads:

> By its nature an *ex parte* order is essentially a provisional order made by a judge on the basis of evidence and submissions emanating from one side only and there is therefore no basis for making a definitive order and accordingly when the judge reviews his provisional order in the light of evidence and argument adduced by the opposite party, he is not hearing an appeal from himself and is in no way inhibited from discharging or varying his original order (per Sir Jon Donaldson M.R. in *WEA Records Ltd. v. Visions Channel 4 Ltd.* [1983] 1 WLR; [1983] 2 All ER 589, CA).

Opening an avenue for an aggrieved party to apply, in my view, provides the refinement of the process by which the judge deal with a given application which he may not have satisfactorily done by hearing only one side of the story. The application to set aside therefore provides the means by which he can review if necessary, his own decision. To quote the notes at p. 2255 of the 1998 desk edition of the *Malayan High Court Practice*:

> The rule protects the basic right accorded to litigants, that a party who has not had the opportunity of being heard may apply to the court to discharge an order obtained in his absence: *Boyle v. Sacker* [1888] 39 Ch D 249 at 251.

I would not therefore accept the submission of counsel for the plaintiff that the 4th defendant had no right to apply to set aside the decision heard on the merit by Steve Shim J in this application and that his only recourse was to appeal to the Court of Appeal.

But that is not the end of the matter for the 4th defendant.

To succeed, he would still have to satisfy the court that there are valid grounds by the same test formulated by Lord Atkin in *Evans v. Bartlam* [1937] AC 473 that had been adopted and applied in our jurisdiction in countless cases. That case is of course concerned specifically with the setting aside of a judgment in default where the case had not been argued on the merit. A *fortiori*, the same test should be applied to setting aside an interlocutory order heard upon the merit. This was what Lord Atkin said in that case:

> The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a *prima facie* defence. It was suggested, in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

There is a compelling argument that a litigant ought not to be allowed to suffer through the neglect of his counsel. But equally compelling is the argument that to set aside the order would tantamount to denying the plaintiff the fruit of a perfectly regular decision considered on the merit, which he was justly entitled to. Nevertheless, the law as it now stands is not in favour of the 4th defendant – the inadvertence of his counsel to attend to his interest cannot constitute a good reason to set aside an order which had been regularly obtained and heard on the merit.

Thus in *Chin Hua Sawmill Co Sdn. Bhd. v. Tuan Yusoff bin Tuan Mohamed* the Federal Court had to consider whether to allow an application for special leave to file and to serve a notice of appeal out of time under the Federal Court (Civil Appeals) (Transitional Rules) 1963 on the ground of the solicitor's inadvertance to instruct his staff to serve the notice on time. This was what Ali FJ speaking for the Federal Court said:

> It is necessary to consider whether special leave should be given in this case. The affidavit in support of the notice of motion is that of Mr Foo Say Ghee, the applicant's solicitor. In para. 16 Mr Foo Say Ghee said that from 9 February, 1973 until 26 March, 1973 he was not in a proper and normal state of mind to conduct his office work. This was because he was personally involved in matters which have nothing to do with the applicant's case. In such a state of mind he said he inadvertently omitted to instruct his staff to serve the notice on the respondent or the respondent's solicitors. Here is a clear admission that the failure to serve the notice was due to the solicitor's mistake. Needless to say that such mistake is not a ground for granting special leave. That must be so for the obvious reason that it is not possible to draw a dividing line between a mistake which can support the exercise of a discretionary power

> and that which cannot. A mistake is a mistake whatever may be the reason for it. As to whether or not Mr Foo's mistake amounts to negligence we express no opinion.

In the more recent Court of Appeal case of *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 MLJ 54, the appellant applied for leave to file a notice of appeal out of time on the ground that a new clerk of the appel1ant's solicitor had allowed the time to lapse for one month. Siti Norma Yaakob JCA (as she then was) speaking for the panel refusing leave, said at p. 56:

> The granting or dismissal of an application for the extension, of time is very much a discretionary matter. In this instance, the court would not exercise its discretion in favour of the appellant as the omission on the part of a solicitor to be vigilant could hardly be described as an acceptable explanation for the delay.

Finally in the *Delcont*'s case *(supra)* itself, the failure of counsel to enter the date of hearing in her diary was held to be insufficient ground to set aside an order made after the plaintiff's application was heard on the merit in her absence, following *Chin Hua Sawmill (supra)*.

With respect to the merit of his defence, the 4th defendant's application before the registrar was based on two grounds as they appear in his affidavit in support in encl. 39.

First he said he was not aware that the plaintiff had commenced legal proceedings and obtained judgment against him. He was no longer staying in his former address in Taman Melawati having moved to Taman Bandar Baru, Sri Damansara some years back. He became aware of the matter only when a bankruptcy notice pursuant to the judgment was served on him, rightly at his present address.

Secondly, he said he was persuaded by his brother-in-law, Michael Tan Boon Ngee who was in control of the 1st defendant company to sign the letter of guarantee as a guarantor for the loan that the company had taken from the plaintiff to buy a factory. He claimed that he did not understand the English language being merely a small trader by occupation.

The service of the writ of summons, it is clear from the affidavit in reply of the plaintiff's bank officer (encl. 40) was effected by means of a substituted service by an advertisement in the Malay Mail dated 21 May 1998 and by a posting on the notice board of the court. The 4th defendant never disputed the regularity of the substituted service itself. Counsel for the plaintiff was therefore perfectly right in submitting that the place of residence of the 4th

defendant was not an issue. The 4th defendant must under the circumstances be deemed to have constructive notice of the issuance of the summons against him, wherever he may have resided.

The claim that he was persuaded to sign the letter of guarantee and that he did not understand the English language, it is clear to me, could not have afforded the 4th defendant a viable defence to the plaintiff's claim against him as a guarantor of the 1st defendant company. The law is clear. In the absence of fraud or misrepresentation a person who signs a document cannot avoid his obligations by simply pleading *non est factum*. This principle has been applied in countless cases by the English courts notably, in the oft-cited case of *L' Estrange v. F. Graucob Ltd.* [1934] 2 KB 394 wherein the following short passage of the judgment of Scrutton LJ appeared:

> When a document containing contractual terms is signed, then in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

The principle was brought to our shores over a hundred years ago in *Ismail bin Savoosah & Ors v. Hajee Ismail* [1889] 4 Ky. 453, 458 in the following passage in the judgment of Wood Ag. CJ:

> It was argued that the defendant being ignorant of the English language he is to be excused on that account from the performance of his contract, but it is to my mind clear that in the common principle that govern the law of contract, the person who contracts by a written document, whether or not he understands the language on which it is written, is bound, in the absence of fraud or misrepresentation, by the terms of that contract, as to which proposition no objection was authoritatively sustained.

Since then the principle has been restated and applied in modern times in numerous cases, more recently in *Wan Salimah bte Wan Jaffar v. Mahmood bin Omar; Anim bte Abdul Aziz (Intervener)* [1998] 1 CLJ 480, wherein at p. 488, Abdul Malik Ishak J, applying *L' Estrange (supra)*, said:

> It is trite law that when a party signs a contract knowing it to be a contract which governs the relations between them, like the present case, then, to use the words of Denning J (as he then was) in *Curtis v. Chemical Cleaning & Dyeing Co. Ltd.* [1951] 1 All ER 631, his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation.

The 4th defendant fails on both scores. His application must accordingly be dismissed with costs.

(Enclosure 55)

Pursuant to the dismissal of his application to set aside the 4th defendant now applies for a stay of execution of the judgment in default of appearance entered on him pending his appeal to the Court of Appeal.

The application is basically grounded on the plea that he has a good defence to the plaintiff's claim, that his appeal if allowed would be rendered nugatory, that the plaintiff had already commenced bankruptcy proceedings against him, and that he would not in any case be able to satisfy by reason of poverty, the large judgment debt of over RM4,212,232.67 entered against the defendants.

The perimeters within which the court should go about in exercising its discretion whether or not to allow a stay is defined somewhat in the Federal Court case of *Re Khong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Khong Thai Sawmill (Miri) Sdn Bhd & Ors. (No. 2)* [1976] 1 MLJ 131 wherein Lee Hun Hoe CJ, speaking for the panel said:

> Again in *Smith, Hogg & Co. Ltd. v. The Black Sea & Baltic General Insurance Co. Ltd.*[4] where in dismissing a motion for stay of execution of the order of the Court of Appeal for assessment of damages pending an appeal to the House of Lords, Scott LJ said:
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> > The Court of Appeal has had to consider this question some time ago and decided that the practice on appeals to the House of Lords was that stay of execution, pending such an appeal, would not be granted save under very exceptional circumstances, such as for instance, where execution would destroy the subject-matter of the action or deprive the appellant of the means of prosecuting the appeal. In our view the appellant's motion is not consistent with the practice on which this court, after consideration, has determined.

Halsbury's Laws of England, 3rd edn, vol. 16 at p. 35 states:

> The court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.
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> An appeal which would be nugatory if stay was refused by reason of the poverty of the respondent would be an example of special circumstances. See *Wilson v. Church (No. 2)*.[5] Another example is that payment of a judgment debt would destroy the substratum of the appeal: *Metropolitan Real and General Property Trust, Ltd. v. Slaters and Bodega Ltd*.[6] However, an allegation on an appeal that there has been misdirection at the trial would not be sufficient to bring it within the special circumstances: *Monk v. Bartram*.[7]

It is plain without having to elaborate, that there is no ground whatsoever upon which this court can exercise its discretion to grant a stay. The fact that the defendant cannot afford to pay the judgment debt and that the order if not set aside would made him a bankrupt are hardly factors that ought to be considered. Neither could his appeal be rendered nugatory, for the judgment and any bankruptcy order that may follow are clearly not orders that are irreversible.

The application is dismissed with costs.

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